ILEC can rebut this presumption "only if the restrictions are narrowly tailored." *Local Competition Order* ¶ 939.

Last January, the U.S. Court of Appeals held that data affiliates of ILECs are subject to all of the obligations of Section 251(c) of the 1996 Act, including the resale obligations set forth in Section 251(c)(4):

> As the Commission concedes, Congress did not treat advanced services differently from other telecommunications services. *See* Deployment Order ¶ 11. It did not limit the regulation of telecommunications services to those that rely on the local loop. For that reason, *the Commission may not permit an ILEC to avoid § 251(c) obligations as applied to advanced services by setting up a wholly owned affiliate to offer those services.*[31]

Thus, the court vacated the portion of the *SBC/Ameritech Merger Order* that had exempted the advanced services provided by SBC's advanced services affiliate from the requirements of Section 251(c). *ASCENT*, 235 F.3d at 663, 668.

Under *ASCENT*, those requirements are now binding on Verizon, because the Commission's *Bell Atlantic/GTE Merger Order* created an exemption for Verizon's advanced services affiliate, Verizon Advanced Data Inc. ("VADI"), that was identical to the exemption set aside by the D.C. Circuit. The Commission so held in its order approving Verizon's Section 271 application for Massachusetts, declining to apply *ASCENT* only because Verizon filed that application before the court issued its decision. *See Massachusetts 271 Order* ¶ 219 & n.705. Indeed, the Commission has stated that it expects BOCs "to act promptly to come into compliance with section 251(c)(4) in accordance with the terms of the [*ASCENT*] decision." Kansas/Oklahoma *271 Order* ¶ 252 n.768.

[31] *See Association of Communications Enterprises* v. *FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001) ("*ASCENT*") (emphasis added).

Verizon, however, has not done so. Indeed, Verizon's claim that it is now in compliance with *ASCENT* and its resale obligations is difficult to fathom.[32] The claim appears to be based on VADI's operations, including VADI's practice of procuring DSL through a line-sharing arrangement with Verizon, VADI's allegedly limited retail sales to customers, and the restrictions imposed by the Bell Atlantic/GTE merger conditions. But these arguments are beside the point. The reality is that Verizon offers DSL service directly to end-users. As a result, to demonstrate compliance with the competitive checklist, Verizon must make DSL service available to CLECs at an avoided cost discount without unreasonable restrictions or conditions. It has not done so, and thus its application must be denied.[33]

There is no doubt that Verizon is offering DSL service directly to end-users. For example, on its web page, Verizon gives residential customers of the former Bell Atlantic-Pennsylvania the option of ordering DSL *either* as a stand-alone service *or* as part of its "Verizon Online DSL" package of DSL and Internet Access. The web page advises these end-users that when they order by phone, "*you can order DSL* and choose to get your Internet access service

[32] *See* Verizon Br. at 55; Dowell Decl. ¶ 3; *ex parte* letter from Dee May (Verizon) to Magalie Roman Salas in CC Docket Nos. 01-100, *et al.*, dated June 27, 2001, Att. at 6-9 ("June 27 *ex parte*").

[33] On July 9, 2001, Verizon filed an *ex parte* submission to the Commission promising that VADI will make available resold DSL service for existing resold voice lines in Pennsylvania in the future. *See ex parte* letter from Dee May (Verizon) to Dorothy Attwood filed July 9, 2001, in CC Docket No. 01-138. Because AT&T received this letter only shortly before finalizing its response to Verizon's application, it has not had sufficient time to conduct a full evaluation of the proposal. AT&T intends to file a comprehensive response to Verizon's letter, either as an *ex parte* submission or in its reply comments in this proceeding. Nonetheless, even upon a limited review it is clear that Verizon's proposal is inadequate and cannot cure its current violation of Section 251(c)(4). The proposal is limited to resold voice lines, and would not extend to carriers providing service over the UNE platform or UNE loops. *Id.* at 1. In addition, even assuming that production trials are successful, Verizon acknowledges that commercial orders for resold DSL could not be submitted until September 7, 2001, and ordering would be subject to volume limitations until at least January 2002. *Id.* at 2-3. Moreover, Verizon's proposal is expressly conditioned on the Commission's grant of Verizon's forthcoming request for Special Temporary Authority in the Bell Atlantic/GTE merger proceeding. *Id.* at 3. For these reasons, Verizon's promise to provide resold DSL – which, by its own admission, would not be fully implemented until at least six months from now – should be given no weight. *See also* letter from James J. Valentino (attorney for AT&T) to Magalie Roman Salas, filed July 10, 2001, in CC Docket No. 01-100 (describing insufficiency of Verizon's eleventh-hour proposal to resell DSL over "existing resold voice lines" in Connecticut").

from one of Verizon's participating ISPs."[34] Verizon further advises the end-user of what "your Verizon DSL charge will be" if he or she purchases DSL through the "participating" (*i.e.*, unaffiliated) ISPs, and states that the "Verizon DSL charge" will be "additional" to the end-user's ISP charges.[35]

Verizon's recent *ex parte* submission to this Commission regarding its pending application for Section 271 authority in Connecticut confirms that Verizon is offering DSL as a separate stand-alone service directly to retail customers. Verizon states that "Verizon and VADI do not in fact bundle voice and xDSL services for their end users . . . . Here, . . . the voice services and DSL services *are offered, ordered, and priced separately*." June 27 *ex parte*, at 8-9 (emphasis added).

Phone conversations by AT&T representatives with Verizon further confirmed that Verizon offers DSL directly to end-users. Verizon answered inquiries about ordering DSL without transferring the caller to VADI or any other Verizon affiliate. Verizon never suggested that any of these affiliates, rather than Verizon Pennsylvania, is responsible for all customer inquiries or orders regarding DSL. Nolen Decl. ¶ 6. Moreover, Verizon stated that if the customer wished to order only DSL from Verizon while obtaining Internet service from an unaffiliated ISP, the customer would receive one bill from Verizon for the DSL and pay a separate charge directly to the ISP for the Internet service. *Id.* ¶¶ 7-8.

Verizon's offer of DSL service has succeeded in the marketplace. Verizon's press release describing its financial results for the first quarter of 2001 states that during the first

[34] Attachment 1 hereto, p. 6 (located at http://bellatlantic.com/infospeed/more_info/buying.html) (emphasis added).

[35] *Id.* p. 8 (located at http://www.bell.atl.com/infospeed/more_info/pricing/isps.html).

quarter Verizon added "180,000 new DSL (digital subscriber line) customers for [a] total of 720,000."[36] This is hardly the report of a modest wholesaler of DSL service to ISPs, but instead reflects the activities of a mass-marketer of DSL service.

Because Verizon offers DSL service at retail to end-users, under Section 251(c)(4) and the Commission's *Second Advanced Services Order*, Verizon must offer DSL as a stand-alone service for resale at a wholesale discount and on terms that are neither unreasonable nor discriminatory.[37] It has not done so. Verizon makes DSL available for resale *only* as long as Verizon continues to provide the voice service. Verizon Br. at 54-55. Thus, Verizon refuses to make DSL available for resale to a given customer if a CLEC also wishes to provide voice service to that customer through resale of Verizon's voice service. In addition, a CLEC would be unable to provide resold DSL service if it provides voice service to that customer using a UNE-P or UNE-Loop arrangement.[38]

These restrictions are each unreasonable and discriminatory conditions and limitations on the resale of telecommunications services that violate Section 251(c)(4). By refusing to make DSL available for resale unless Verizon remains the voice provider, Verizon is denying CLECs the same ability that it has to provide customers with all of the services that they

[36] "Verizon Communications Posts Strong First Quarter," Verizon press release dated April 24, 2001 (Attachment 2 hereto, at 1) (found at http://investor.verizon.com/news/VZ/2001-04-24X470100.html).

[37] *See* Second Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd. 19237 (1999) (*"Second Advanced Services Order"*), ¶ 3 ("advanced services sold at retail by incumbent LECs to residential and business end-users are subject to the Section 251(c)(4) discounted resale obligation, without regard to their classification as telephone exchange service or exchange access service"), *petition for review denied sub nom. Association of Communications Enterprises v. FCC*, No. 00-1144, 2001 WL 709210 (D.C. Cir. 2001).

[38] *See* Transcript of En Banc Hearing held April 26, 2001, *infra*, at 264-265, 274-275 (Verizon Application, App. B, Vol. 16, Sub-Tab 27). Moreover, even when Verizon makes DSL available for resale because the customer is retaining Verizon as its voice provider, Verizon will disconnect the CLEC's resold DSL if the customer subsequently elects to switch to a different carrier for voice service. *Id.* at 276-277, 281.

desire. Although Verizon provides both DSL and voice service to its own retail customers, under Verizon's policy CLECs cannot provide DSL through resale if they provide voice service – and they cannot provide voice service at all if they obtain DSL from Verizon through resale. This puts CLECs at an enormous competitive disadvantage. Demand for DSL continues to increase dramatically (as evidenced by the 33 percent increase in Verizon's DSL customers during the first quarter of 2001 alone). Given the widespread consumer desire for one-stop shopping, customers are likely to obtain voice and DSL service from the same provider, wherever possible.[39] Unless CLECs have the same ability as Verizon to provide both voice and DSL service, Verizon's DSL customers will effectively be quarantined from voice competition by CLECs, and CLECs will be severely hindered in their market entry.

Verizon's restrictions are also unreasonable because Verizon has no legitimate basis for imposing them, other than to suppress competition. From an economic standpoint, Verizon would logically be expected to *welcome* the opportunity to resell DSL to CLECs providing voice service through the UNE platform (or through UNE loops) in areas where Verizon is providing DSL service. In such cases, by reselling the DSL service at the avoided cost discount, Verizon would be receiving the same profit from that service as it would receive from a direct sale to a retail customer, without being required to pay for the avoided costs. Indeed, to the extent that Verizon paid any part of the cost of the loop as a cost of the DSL service, it would receive a "double benefit" from resale of DSL to a UNE-P or UNE-L voice provider, because the CLEC is also paying the full price for the loop. The restrictions that

[39] Verizon's President and Co-Chief Executive Officer, Ivan Seidenberg, recognized this point in a presentation that he made in March 2001 to Credit Suisse First Boston. Mr. Seidenberg stated: "Our strategy in the consumer market is to achieve more wallet share. With a single brand and an ability to focus on customer segmentation strategies, we can provide customers with all sizes of bundles and packages that give them the services they need." (Available at <http://www.senteco.com/telecom/verizonfull.htm> – Verizon Full Presentation.htm).

Verizon imposes on DSL are thus illogical and clearly contrary to Verizon's economic self-interest – unless Verizon's purpose is to suppress competition by denying competitors the ability to offer DSL service, which is clearly contrary to the pro-competitive objectives of the 1996 Act and the express requirements of Section 251(c)(4). Because Verizon has not demonstrated that it is making DSL services for resale at a wholesale discount without unreasonable restrictions, it has not demonstrated and cannot demonstrate that it has fully implemented all of the requirements of the checklist. *See Second Advanced Services Order* ¶¶ 17-18.

None of Verizon's arguments to the contrary has merit. Verizon's principal argument is that Verizon is exempt from the wholesale obligations of Section 251(c)(4) because it is VADI, and not Verizon, that offers DSL to the public.[40] Under *ASCENT*, however, it is immaterial whether the party offering DSL to retail end-users is Verizon or VADI; in either event, the provision of DSL at retail creates a resale obligation for Verizon. Verizon's formalistic reliance on corporate structure is precisely what *ASCENT* prohibits. Under the court's decision, an ILEC's corporate structure cannot serve to immunize the ILEC from the requirements of Section 251(c). *ASCENT*, 235 F.3d at 668. For purposes of compliance with that statute's requirements, Verizon and VADI must be viewed together as one and the same entity, not as separate companies.

[40] *See* June 27 *ex parte* at 1 ("VADI offers xDSL service to end users by purchasing the same line-sharing services from Verizon as other xDSL providers"); Verizon Br. at 53 (VADI "offers for resale at a wholesale discount those DSL services that are subject to a discount under the Commission's rules"); *id.* at 54 ("Verizon provides DSL services in Pennsylvania exclusively through VADI"); Dowell Decl. ¶ 25 ("VADI offers its DSL service at resale in accordance with the Commission's prior orders," and under VADI's effective federal tariff "eligible carriers can purchase VADI's retail Infospeed Solutions service at the retail rate less the avoided cost discount under Section 251(c)(4)"). Although VADI has filed a federal tariff offering Infospeed Solutions at a wholesale discount for resale, it has filed no State tariff making a similar offering. *See* Dowell Decl. ¶ 25; Transcript of En Banc Hearing Held April 26, 2001, in PaPUC Docket No. M-00001435 at 269 (Application, App. B, Tab C, Vol. 3, Sub-Tab 1).

Verizon's remaining attempts to justify its disregard of its resale obligations do not withstand scrutiny. *First*, Verizon asserts that it is not required by Section 251(c)(4) to resell DSL where the CLEC is the voice provider, because: (1) VADI provides DSL under a line sharing arrangement with Verizon; (2) under the Commission's orders, Verizon is required to provide -- and is providing -- line sharing only when Verizon is the voice provider; (3) thus, when Verizon does not provide voice service, VADI cannot and does not provide DSL service, either at retail or for resale; and (4) under Section 251(c)(4)(A), VADI is required to resell only those "service[s]" that it currently "provides." *See* Verizon Br. at 54-55; June 27 *ex parte* at 1-2.

Verizon's reasoning is flatly contrary to the *ASCENT* decision, because it relies on its corporate structure as a shield to avoid the obligations of Section 251(c) – which, under *ASCENT,* it cannot do. The line sharing arrangements between VADI and Verizon exist *only because VADI is an affiliate of Verizon.* Absent the existence of VADI, Verizon itself would be providing both voice and DSL service – and no line sharing would occur at all.[41] *ASCENT* makes clear that mechanisms based on the "separate" corporate identity of the data affiliate, such as line sharing arrangements, are to be disregarded in determining whether the requirements of the statute have been satisfied.[42] For purposes of Section 251(c), the sole relevant fact here is that Verizon – whether itself or through VADI – provides voice service and DSL at retail to retail customers. The nondiscrimination and reasonableness obligations of Section 251(c)(4) therefore require that Verizon make *both* services available for resale, either separately or

[41] As the term notes, "line sharing" is a bilateral arrangement between the CLEC and ILEC whereby the CLEC provides data service, and the ILEC provides voice service, on the same loop. *Line Sharing Order* ¶ 13; *Line Sharing Reconsideration Order* ¶ 5.

[42] *See ASCENT*, 235 F.3d at 666 ("to allow an ILEC to side slip § 251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate seems to us a circumvention of the statutory scheme"); *id.* at 668 ("the Commission may not permit an ILEC to avoid § 251(c) obligations by setting up a wholly-owned affiliate to provide those services").

together, in order to give CLECs the same ability to provide these services to their customers. Verizon cannot lawfully restrict the availability of DSL to situations where the voice service is provided by Verizon on the basis of what "VADI" purportedly can or cannot do.

Verizon's reliance on VADI's provision of DSL through line sharing arrangements is further undermined by its recent request that the Commission eliminate "immediately" the requirement of a separate data affiliate in the *Bell Atlantic/GTE Merger Order*, and that Verizon be permitted to provide advanced services – including DSL – directly to its retail customers.[43] Verizon argued that the structural separation requirement should be eliminated because, *inter alia*, it "results in additional unnecessary duplication and expense."[44] Furthermore, Verizon rationalized that the separate affiliate requirement "will automatically terminate no later than nine months after the D.C. Circuit's decision in *ASCENT*."[45] Verizon's cynical advocacy to this Commission – requesting immediate elimination of the structural separation requirement while relying on that separation in an attempt to avoid its obligations under Section 251(c)(4) – is nothing less than a shell game that this Commission should not tolerate.[46] Verizon's own request that the corporate separation be eliminated is all the more reason why VADI and Verizon should be treated as the same for purposes of Section 251(c)(4).[47]

[43] *See* Letter from Gordon R. Evans (Verizon) to Dorothy Attwood (FCC), dated April 26, 2001, at 1 ("Verizon April 26 Letter") (attached to Letter from Gordon R. Evans to Magalie Roman Salas, dated May 1, 2001); Public Notice (DA 01-1325) issued May 31, 2001 in CC Docket No. 98-184.

[44] Verizon April 26 Letter at 3.

[45] *Id.* at 1.

[46] Notably, although AT&T and other commenters requested that the Commission require Verizon to provide information on how it intended to comply with its obligations to provide, *inter alia*, information on how it proposed to comply with its DSL resale obligations under Section 251(c)(4) before it is permitted to re-integrate VADI, Verizon declined to do so, stating only that it "obviously fully intends to comply with its legal and regulatory obligations." Reply of Verizon filed June 28, 2001, in CC Docket No. 98-184, at 5.

[47] Verizon's attempt to use the Commission's line sharing rules to avoid its obligation to resell DSL under Section 251(c)(4), and thereby impede competition, is clearly contrary to the pro-competitive intent of those rules. *See Line*
(continued)

Verizon bases its legal position that it is entitled to refuse to resell DSL when it is not the voice provider on certain Commission orders under which, it alleges, "Verizon and other ILECs are *entitled* to place that limitation on their line sharing services." June 27 *ex parte* at 2-3 (emphasis in original); *see also* Verizon Br. at 54-55. Verizon misses the point. The three orders cited by Verizon hold only that an ILEC is not required, *as part of its obligation to provide line sharing*, to make the high-frequency portion of the loop available to CLECs or to provide DSL service directly to a customer when a CLEC is providing voice service to that customer, because "line sharing contemplates that the incumbent LEC continues to provide POTS services on the lower frequencies while another carrier provides data services on higher frequencies."[48]

The issue here, however, is not whether CLECs wish to be provided DSL as part of a line sharing arrangement. Indeed, the issue here does not involve a CLEC's request for line sharing at all, which is a UNE unbundling issue pursuant to Section 251(c)(3). Rather, the question here is whether CLECs who wish to provide *both* voice and DSL service directly to the customer (and thus *avoid* line sharing) can obtain DSL service from Verizon through resale – and whether Verizon's refusal to resell DSL in such circumstances constitutes an unreasonable and discriminatory restriction on resale under Section 251 (c)(4), in view of its own ability to provide both voice and DSL service at retail. None of the Commission orders cited by Verizon address the resale issue at all. The *Line Sharing Order* only addresses the question of whether, after a line sharing arrangement has been established, the ILEC must continue to make the high-

---

Sharing Order ¶¶ 4, 54-55. Indeed, the Commission has also required ILECs to give CLECs the ability to engage in line *splitting* arrangements, in order to increase the ability of CLECs to provide both voice and DSL service in competition with ILECs. *See id.* ¶¶ 17-25.

[48] *See Line Sharing Order* ¶ 72; *Texas 271 Order* ¶ 330; *Line Sharing Reconsideration Order* ¶ 26. The Commission has determined that the ILEC is required to provide line sharing as part of its obligation to provide nondiscriminatory access to unbundled network elements under Section 251(c)(3) and (d)(2) the Act. *See Line Sharing Order* ¶¶ 6, 16.

frequency portion of the loop network element available as a UNE if the customer terminates the ILEC's voice service. The *Texas 271 Order* and *Line Sharing Reconsideration Order* address only the issue of whether the incumbent must continue to provide DSL service *directly to an end user* when a CLEC provides the customer's voice service using UNE-P. Thus, those decisions are inapposite here.

Second, Verizon is wrong that "the Bell Atlantic/GTE Merger Conditions affirmatively limit VADI to obtaining from Verizon only those services that also are available to other CLECs, which means that VADI may not consistent with its legal obligations provide DSL through line sharing to customers other than Verizon voice customers." Verizon Br. at 55 (footnote omitted). Indeed, the Commission emphasized in that order itself that the merger conditions are "merger-specific and not determinative of the obligations imposed by the Act or our rules on Bell Atlantic, GTE, or any other telecommunications carrier." *Bell Atlantic – GTE Merger Order* ¶ 253. The Commission expressly stated that the conditions were not "to be considered as an interpretation of sections of the Communications Act, *especially sections 251, 252, 271 and 272*." *Id.* (emphasis added).[49] Thus, the Commission's express statements rebut any notion that the purported limitation on VADI in the merger condition Verizon cites does not obviate the need for Verizon to demonstrate, on an independent basis, that its selective provision of DSL at resale meets the requirements of Section 251(c)(4) and Section 271.

[49] The Commission reiterated these points in the appendix to its order setting forth the specific merger conditions. The Commission stated, for example, that "these conditions shall have no precedential effect in any forum," and that "To the extent that these Conditions impose fewer or less stringent obligations on Bell Atlantic/GTE than the requirements of any past or future Commission decisions or any provisions of the 1996 Act, . . . nothing in these Conditions shall relieve Bell Atlantic/GTE from the requirements of that Act" or from "Commission or state decisions implementing the 1996 Act or any other pro-competitive statutes or policies." *Bell Atlantic – GTE Merger Order* App. D at 1 n.2.

Third, Verizon suggests that requiring it to resell DSL to a CLEC providing voice service to the customer would present "significant systems and operational issues" that would require a "collaborative industry effort" before such a product could be offered. *See* Verizon Br. at 56 & n.61; June 27 *ex parte* at 4-5. Verizon's argument is meritless. It is clearly technically feasible to provide resold DSL service over a UNE loop. A CLEC that used UNE-P, for example, would access Verizon's advanced service in the same way that Verizon provides line sharing today in conjunction with VADI. Indeed, the physical facilities used to provide the voice and DSL services are the same, with Verizon's circuit switch providing voice service and its advanced services network providing the resold DSL service. Critically, Verizon does not claim otherwise.

The "profound operational issues" described by Verizon (June 27 *ex parte* at 4) are similarly without merit. These issues are based on Verizon's assumption that the resale of DSL would result in a "three-carrier (and in some cases four-carrier) sharing arrangement." *Id.* In reality, however, it is likely that only two carriers would be involved – Verizon and a single CLEC seeking to provide both voice and DSL service. In any event, as the Commission has effectively recognized by requiring ILECs to provide (or facilitate) line sharing and line splitting arrangements, the ILEC's obligations do not depend on the total number of carriers that may be involved.[50] Moreover, although many of the "operationally complex questions" described by

[50] The Commission has stated, for example, that an ILEC's obligation to give CLECs the ability to engage in line splitting arrangements "extends to situations where a competing carrier seeks to provide combined voice and data services on the same loop, *or where two competing carriers join to provide voice and data services through line splitting.*" *Line Sharing Reconsideration Order* ¶ 18 (emphasis added). Under Verizon's method of counting, three carriers (including the ILEC) are involved in a line splitting arrangement where one CLEC provides the voice service and a different CLEC provides the data service. June 27 *ex parte* at 4.

Verizon exist in identical or similar form in line sharing and line splitting arrangements,[51] the Commission has properly recognized that those issues do not relieve the ILECs of their obligations to support such arrangements.[52]

Fourth, perhaps recognizing the lack of merit in its arguments, Verizon asserts that it "has had preliminary discussions with the CLEC on this subject" and promises that it will "work cooperatively" with CLECs in the current New York DSL Collaborative to address the "operational issues associated with offering DSL over resold voice lines" if CLECs express interest in using this product. *See* Verizon Br. at 56; Dowell Decl. ¶ 27.[53] This rationalization is little more than a promise to achieve compliance with the requirements of Section 251(c)(4) (and thus Section 271) in the future. *See* Dowell Decl. ¶ 27 (stating that Verizon "will develop" an offering of DSL with resold voice lines, assuming CLEC interest and resolution of "operational

[51] *See* June 27 *ex parte* at 4-5 (describing issues involving, *inter alia*, establishment of business and OSS relationships, access to customer records, effects of change in voice provider, responsibility for coordinating trouble reports, and responsibility for coordinating service changes that affect loop facility).

[52] The other policy arguments advanced by Verizon to justify its restriction on resale of DSL are similarly without merit. Although Verizon asserts that a collaborative industry effort would be necessary to implement a requirement to resell DSL to all CLECs (June 27 *ex parte,* Att. at 5), such an effort is precisely the approach that the Commission encouraged and anticipated when it required ILECs to facilitate the analogous practice of line splitting. *See Line Sharing Reconsideration Order* ¶ 21. Verizon's predictions that resale of DSL to a CLEC providing voice service would result in a "dramatic and very costly revision of the methods and procedures currently deployed for ILEC-based line sharing" (June 27 *ex parte* at 5-6) is baseless, given that (as described above) CLECs using UNE-P can access DSL in the same way that Verizon provides line sharing today for VADI. Finally, Verizon cannot reasonably argue that it relied on prior Commission rulings for its refusal to resell DSL to CLECs providing voice service. *See* June 27 *ex parte* at 6. Those decisions involved Verizon's line *sharing* obligations to CLECs – a situation not presented here, since line sharing is not being requested. Moreover, Verizon has undoubtedly been aware of the *ASCENT* decision since it was issued in early January. As the party with sole control over the timing of its application, Verizon could have deferred its filing until it fully complied with the court's decision, rather than file an application before such compliance had been achieved – as the Commission expected would be the case after its *KS/OK 271* decision.

[53] Verizon's suggestion that CLECs have not yet expressed interest in providing DSL through resale while also providing voice service is disingenuous, given its own admission that it has already had discussions (however "preliminary") with CLECs on this subject. Dowell Decl. ¶ 27. Moreover, as Verizon admits, CLECs asserted before the PaPUC that Verizon's current restrictions on resale of DSL are unlawful and that Verizon is required to provide resold DSL at a wholesale discount regardless of whether Verizon is providing the voice service. *See* Verizon Br. 54; *see also* PaPUC Consultative Report or 238-244 (addressing challenge to Verizon's restriction on resale of DSL).

issues" in the New York collaborative). Under long-standing Commission precedent, such promises of future compliance are entitled to no weight. *E.g., Michigan 271 Order* ¶¶ 55, 179.

Even leaving aside the Commission's precedents, Verizon's promise to address the issue in the New York collaborative is a hollow one. Although the issue of Verizon's obligations to resell DSL was placed on the issues list in the New York proceeding in January 2001 – and even though CLECs have asserted the issue in the PaPUC proceeding since that time[54] – to date there has been no discussion of the matter in the Collaborative. Moreover, Verizon's willingness to "discuss" the issue of resale of DSL in the Collaborative appears to be limited to "a new product that would allow DSL to be provided over resold phone lines" – not to a product of resold DSL *and the UNE platform,* even though many CLECs use the UNE platform, rather than resale, to provide voice service. *See* Verizon Br. at 56; Dowell Decl. ¶ 27. Whatever the scope of its willingness to "work cooperatively" with CLECs may be, however, Verizon's restrictions on the availability of DSL for resale remain in effect, and Verizon therefore continues to be in violation of its resale obligations under Section 251(c)(4).

III. VERIZON IS NOT PROVIDING NONDISCRIMINATORY ACCESS TO ITS OSS.

As part of its obligations under both Section 251(c)(3) and the Section 271 competitive checklist, Verizon is required to provide nondiscriminatory access to its operations support systems ("OSS") – an obligation that "requires, simply, that the BOC provide the same access to competing carriers that it provides to itself." *Ameritech Michigan Order* ¶ 143. The Commission has consistently found that nondiscriminatory access to OSS is "a prerequisite to

[54] *See, e.g.,* Letter from Alan Kohler (counsel for AT&T) to James J. McNulty (Secretary, PaPUC), dated May 31, 2001.

the development of meaningful local competition." *See, e.g., Massachusetts 271 Order* ¶ 43; *Kansas/Oklahoma Order* ¶ 104.

As both Commissioners who dissented from the PaPUC's Consultative Report recognized, Verizon has not provided the parity of access required by the Act. Nondiscriminatory access requires that new entrants "be able to provide service to their customers at a quality level that matches the service provided by the incumbent LEC to compete effectively in the local exchange market." *Second BellSouth Louisiana Order* ¶ 83. That situation does not yet exist in Pennsylvania, as AT&T's experience in Pennsylvania illustrates. For example, CLECs lack Verizon's ability to flow through virtually all orders without manual processing; they fail to receive timely billing completion notices that they need to determine when they may properly begin billing their customers; and, despite Verizon's persistent promises, they still do not receive the automated wholesale bills from Verizon that they need to evaluate the accuracy of Verizon's charges. Under those circumstances, CLECs cannot match Verizon's service or compete effectively against Verizon in the market.

Nothing in the KPMG Third Party OSS Report on which Verizon relies (Verizon Br. at 57) changes these realities. The KPMG testing was not intended to determine, and did not determine, whether Verizon was meeting its obligation to provide nondiscriminatory access to its OSS. Fawzi/Kirchberger Decl. ¶ 17. Indeed, given the limitations in the testing methodology that KPMG used, KPMG could not have made such a determination. *Id.* ¶¶ 16-29. For example, in contrast to the testing that it performed on Verizon's OSS in New York and Massachusetts (and that the Commission noted approvingly in its orders granting Verizon's Section 271 applications for those States), KPMG focused its testing in Pennsylvania on a soon-to-be-retired version of Verizon's EDI pre-ordering and ordering interfaces (LSOG-2), while performing only limited testing of the version (LSOG-4) that will be the primary interface used by large CLECs for the foreseeable future. *Id.* ¶ 20-23.

As shown below, Verizon still does not provide nondiscriminatory access to OSS functions that are essential to mass-market competition. The actual experience of AT&T, as well as the data reported by Verizon itself, confirms that basic fact.

1. **Ordering/Provisioning:** Verizon fails to provide parity of access to its ordering and provisioning functions in two significant respects. First, a substantial percentage of CLEC orders do not flow through Verizon's systems without manual intervention, thereby denying CLECs a meaningful opportunity to compete. Second, Verizon does not provide CLECs with billing completion notices in a timely manner, thus raising the possibility of double-billing and lost revenue that Verizon does not experience in its retail operations.

a. **Inadequate Flow-Through Rates:** As the PaPUC found in its report, because of the potential for delay and error that is inherent in manual processing, "The ability to flow-through a substantial number of orders is essential for the efficient processing of CLEC orders." PaPUC Report at 87. The Commission has recognized that low flow-through rates for CLEC orders, while not conclusive proof of the denial of nondiscriminatory access, can "indicate a wide range of possible deficiencies in a BOC's OSS that may deny an efficient competitor a meaningful opportunity to compete in the local market." *Massachusetts 271 Order* ¶ 77.

Verizon's flow-through rates show that CLECs are not receiving parity of access. During the first five months of 2001, the total monthly flow-through rate was only between 44 and 65 percent. These rates were substantially below the corresponding flow-through rates in

New York, even though there should be no reason why the rates in the two States should differ. Fawzi/Kirchberger Decl. ¶¶ 37-39.[55] Indeed, as Verizon acknowledges, the most recent total flow-through rates for orders for UNEs and UNE-P in Pennsylvania that Verizon had reported at the time of its application were *below* those in New York at the time Verizon submitted its 271 application for that State. *See* McLean/Wierzbicki /Webster Decl., Att. 17.

For AT&T's orders, the total flow-through rate was even lower than the aggregate rate for all CLECs reported by Verizon. Moreover, the achieved flow-through rates for AT&T's orders – *i.e.*, the percentage of all AT&T orders that Verizon has purportedly designed to flow through its systems that actually did flow through – have been unreasonably low and far below those that KPMG experienced. *Id.* ¶¶ 35-36.

Because AT&T's orders were submitted in accordance with Verizon's business rules, none of Verizon's arguments attempting to attribute flow-through rates to errors by CLECs applies to AT&T's experience. *Id.* ¶ 34. For example, Verizon's attempt to attribute the inadequate flow-through rates to the "CLECs' own conduct in changing and canceling their orders" is illogical. *See* McLean/Weierbicki/Webster Decl. ¶ 78. The reality of the marketplace is that customers can, and do, change their minds – and CLECs cannot be faulted for responding to their customers' needs. Verizon thus fails to explain away its own decision not to provide flow-through capability for all supplemental orders. Fawzi/Kirchberger Decl. ¶ 45.

In the New York 271 proceeding, Verizon's evidence was sufficient to persuade the Commission that its low flow-through rates should not be given significant weight because

[55] *See also* McLean/Wierzbicki/Webster Decl. ¶ 8 (stating that "CLECs operating in Pennsylvania use the common interfaces and gateway systems provided by Verizon throughout the former Bell Atlantic service areas to obtain access to the underlying OSS"); Verizon Br. at 56.

its performance in handling actual CLEC orders demonstrated that it could accurately process CLEC orders, return timely status notices, and scale its systems to meet increasing demand. *New York 271 Order* ¶¶ 161-163. Verizon cannot make such a showing here. In addition to the fact that its flow-through rates for Pennsylvania today are lower than those reported for New York at the time of the filing of the New York 271 application, Verizon's reported rates of accuracy in processing service orders in Pennsylvania – even with the modifications unilaterally made by Verizon in the method that it uses to calculate the rates – have consistently fallen short of the PaPUC's benchmark, and Verizon takes far more time to send confirmation notices for manually processed orders than for fully automated orders. Fawzi/Kirchberger Decl. ¶¶ 41-42 & nn.29-32.

Finally, Verizon has no incentive to improve its flow-through performance in Pennsylvania. In contrast to the Performance Assurance Plans in effect in New York and Massachusetts, Verizon's PAP for Pennsylvania imposes no financial penalties on Verizon for poor flow-through performance. *Id.* ¶ 40. For all these reasons, then, it is clear that (1) Verizon is capable (as it demonstrated in New York and Massachusetts) of achieving substantially higher flow-through rates, and (2) it has chosen to obstruct competition by refusing to provide comparable electronic access in Pennsylvania, and has successfully avoided having any obligation imposed upon it to achieve for CLECs electronic order processing equal to what Verizon enjoys. For this reason alone, Verizon has failed to demonstrate that it has fully implemented the competitive checklist. *See* 47 U.S.C. § 271(d)(3)(A)(i); *Massachusetts 271 Order* ¶ 77; *Texas 271 Order* ¶ 179; *Second BellSouth Louisiana 271 Order* ¶¶ 107-108.

b. Failure To Provide Timely Billing Completion Notices: As the Commission found in the *New York 271 Order*, "untimely receipt of order completion notices directly impacts a competing carrier's ability to serve its customers at the same level of quality that [Verizon] provides to its retail customers." *New York 271 Order* ¶ 187. Thus, it is critical that CLECs receive billing completion notices ("BCNs") in a timely manner, because they not only reflect the provisioning work that actually was performed for the CLEC's customer, but also advise the CLEC that Verizon has stopped its billing for the customer. Absent receipt of a timely BCN, the CLEC has no way of knowing when and whether it may properly begin billing the customer – creating the risk that the customer will be double-billed.. *See* Fawzi/Kirchberger Decl. ¶¶ 47-48.[56] Moreover, if Verizon's billing systems have not been updated, the customer may not be able to change products or services. PaPUC Report at 97.

Under any reasonable method of measurement, Verizon has consistently failed to provide timely BCNs. For example, AT&T's data show that, during each month of 2001 when AT&T conducted UNE-P production testing, at least 25 percent of AT&T's BCNs were late, even if one uses a highly conservative benchmark to determine timeliness. Fawzi/Kirchberger Decl. ¶ 46. Even the limited data that Verizon has furnished during the PaPUC's 271 proceeding show that Verizon's performance in providing BCNs in a timely manner is substandard – and those data are overstated, due to Verizon's improper method of measuring timeliness. *Id.* ¶¶ 52-58. And critically, Verizon's application offers no basis for concluding that its performance

[56] Double-billing also can occur – and in fact has occurred – when a customer transfers its service from one CLEC to another but Verizon fails to notify both CLECs of that fact. For example, some of AT&T's customers were double-billed because Verizon did not notify WorldCom that the customers had switched to AT&T from WorldCom, even though Verizon is supposed to provide such notification of "lost customers" on weekly line loss reports. Fawzi/Hirchberger Decl. ¶¶ 60-64.

might improve in the future, particularly since there is no performance measurement in place in Pennsylvania with respect to the timeliness of BCNs.[57]

2. **Billing:** Verizon cannot show that it provides CLECs with nondiscriminatory access to billing functions, because it still has not provided CLECs with commercially viable electronic bills – as recognized by both Commissioners who dissented from the PaPUC Consultative Report:

> The problem here is that, despite its efforts over the past two years, Verizon has yet to provide CLECs with an electronic bill which is sufficiently reliable that Verizon will consider it the official 'bill of record.' The practical effect of this on CLECs is that every month they are required to sort through and read hundreds of boxes of paper bills in order to check the accuracy of their bills. This is an impossible task for the CLECs, and it is ironic that they are forced to endure such a procedure in this high-tech industry. One CLEC even testified that it *estimates* what it owes Verizon and pays that amount, and Verizon accepts that payment because it cannot prove otherwise." (Emphasis in original.)[58]

See also Dissenting Statement of Commissioner Brownell at 2 ("Verizon must implement adjustments to its electronic billing systems to insure that CLECs are able to obtain timely and accurate electronic bills. . . Without confidence that the billing systems are absolutely able to deliver adequate services and billing support to its customers, I cannot see how the market can work."); Fawzi/Kirchberger Decl. ¶¶ 65-102.

Since November 1999, AT&T has requested Verizon to provide adequate UNE-P bills in the electronic, mechanized format known as CABS BOS BDT. Verizon, however, has

[57] *See* Fawzi/Kirchberger Decl. ¶ 49; Verizon Br. at 63; McLean/Wierzbicki/Webster Decl. ¶ 103. Although Verizon has belatedly offered to report a BCN timeliness metric "similar to" that used in New York, the standard it proposes is more lenient than the New York standard. *See* Fawzi/Kirchberger Decl. ¶ 57; McLean/Wierzbicki/Webster Decl. ¶¶ 103-104. Even under Verizon's preferred standard, however, its on-time performance is substandard. Fawzi/Kirchberger Decl. ¶¶ 57-58.

[58] PaPUC Consultative Report, Statement of Commissioner Terrance J. Fitzpatrick Concurring in Part, and Dissenting in Part at 2.

not done so. Despite repeated (and unfulfilled) promises by Verizon to provide electronic bills, AT&T continued to receive only paper copies of its UNE-P bills until approximately March 2001 – almost two years after Verizon first claimed that it offered such bills electronically in the CABS/BOS format. Fawzi/Kirchberger Decl. ¶¶ 65, 68, 71-73.[59] Even the electronic UNE-P bills that AT&T has received since March 2001 have been seriously flawed and commercially unusable. *Id.* ¶¶ 65, 92-95. And Verizon *still* fails to provide AT&T with electronic bills for its UNE loop services. *Id.* ¶ 66.

In view of its ability to provide its own retail customers with retail bills in electronic format, Verizon's failure to provide CLECs with adequate electronic bills denies CLECs a meaningful opportunity to compete. Without electronic billing, CLECs cannot verify the accuracy of Verizon's charges – which represent a CLEC's single largest cost of providing local exchange service to customers. Fawzi/Kirchberger Decl. ¶¶ 66-69. Such verification cannot be performed within a reasonable time (if at all) using the paper bills sent by Verizon, which can consist of thousands of pages of documents. *See id.* ¶¶ 66, 70.

Given the substandard quality of the electronic bills that it has provided to AT&T, Verizon's claim that it "provides timely and accurate electronic bills to CLECs today, and . . . will continue to do so in the future," is simply an exercise in wishful thinking. *See* Verizon Br. at 67. Although, contrary to its previous practices, Verizon recently – and unilaterally – announced that CLECs could use the electronic BDT bill as the "bill of record," Verizon had not implemented the necessary system modifications and had not given the CLECs an opportunity to determine whether the bills were in fact usable or reliable before it did so. *Id.* ¶¶ 75-79.

[59] Although Verizon provided AT&T with monthly BDT test bill files for January and February 2001, the bills were so riddled with errors and omissions that they were commercially unusable. Fawzi/Kirchberger Decl. ¶¶ 71-72.

The "fixes" that Verizon claims to have implemented in its systems to improve the BOS BDT between March and June of this year, and the additional "fixes" that it promises to implement in July and August, further undermine its claim that adequate electronic bills are commercially available to CLECs. *See* Verizon Br. at 66; McLean/Wierzbicki/Webster Decl. ¶¶ 135-142, 152. The fact that such changes have been recently implemented – or will be implemented in the future – plainly reflects Verizon's recognition that its electronic bills are not adequate. Furthermore, since some of the "fixes" purportedly implemented by Verizon occurred only within the last few months, it is too soon to determine whether even those "fixes" work as scheduled. Verizon's own witness on billing in the PaPUC proceedings, Warren Geller, recognized that "several billing cycles" of data would be required after implementation of these "fixes" before a proper determination could be made as to whether the fixes worked as intended and whether any problems likely to be associated with the new fixes had been resolved.[60] And, of course, Verizon's promised changes for July and August cannot be given any weight in these proceedings. *See* Fawzi/Kirchberger Decl. ¶¶ 80, 84; *Michigan 271 Order* ¶¶ 55, 179 (promises of *future* compliance with Section 271 by BOC have no probative value to determination of BOC's *present* compliance).

---

[60] Mr. Geller stated:

> What we said is that we're in the process of working through the 66 issues that I identified that are being corrected and the final implementation stages are on June 16th. . . .
>
> What we'd like to be able to do at that point in time is, to insure that all parties have an opportunity to review it, Verizon included, *is to run several cycles, in other words several bill cycles, and at that point in time Verizon would make its final decision as to whether or not BOS-BDT could become the official bill and replace paper* that I've heard is so difficult to open and have to get all these people to open the boxes for it.

Transcript of En Banc Hearing Held 4/25/01 in PaPUC Docket No. M-00001435, at 146 (Application, Tab C, Vol. 3, Sub-Tab 26).

Verizon's claims that it has modified its systems (whether implemented or merely promised) cannot disguise what its own application effectively acknowledges: its electronic bills are inadequate, and numerous major issues concerning the accuracy of such bills remain unresolved. Fawzi/Kirchberger Decl. ¶ 81; *see also id.* ¶ 73. The Pricewaterhouse Coopers ("PwC") review that Verizon commissioned lends no support to its claim that its electronic bills are accurate. That review is no substitute for actual commercial data, which the Commission has described as the most probative evidence of a BOC's compliance with its OSS obligations. *Michigan 271 Order* ¶ 138. PwC simply did not evaluate the CLECs' experience. Instead, PwC simply reviewed Verizon's electronic bills to see if they matched Verizon's paper bills. PwC did not undertake any review of the accuracy of any bill, but merely assumed that the paper bills were accurate, despite CLEC claims attesting to the inaccuracy of Verizon's paper bill.[61] Verizon Br. at 66; McLean/Wierzbicki/Webster Decl. ¶ 143; Fawzi/Kirchberger Decl. ¶¶ 85-92.

Nor are the deficiencies in Verizon's electronic bills cured by Verizon's complex (and completely manual) workaround process. That process still does not give CLECs the ability to perform a reasonable verification of the charges on the bill – an capability that only an adequate electronic bill can provide. *Id.* ¶¶ 82-84. Until Verizon demonstrates that it is providing such bills, it cannot be found to have fully implemented the competitive checklist.

Finally, while promises of improved future performance carry no weight in a Section 271 proceeding, it is important to note that the PaPUC's conditions will not give Verizon an adequate incentive to cure its failure to provide adequate electronic bills. The PaPUC

[61] The recent PwC analysis of Verizon's electronic bills that Verizon attached to a July 3 *ex parte* submission to the Commission in this proceeding provides no more probative evidence that its electronic bills are accurate. *See* letter from Clint Odom (Verizon) to Magalie Roman Salas, dated July 3, 2001. Like its earlier review, the new PwC analysis simply compared Verizon's electronic bills to its paper bills without determining whether the paper bills were in fact accurate. Fawzi/Kirchberger Decl. ¶¶ 93-95.

expressly declined to address Verizon's misreporting of performance data under the erroneous methodology that Verizon unilaterally adopted. PaPUC Consultative Report at 258. Moreover, the modifications that the PaPUC required to the billing remedies in the PAP expire on December 31, 2001 – plainly too short a time to give Verizon any substantial incentive to provide necessary nondiscriminatory support to its competitors in this competitively very significant area by actually fixing the numerous billing problems in its systems. Fawzi/Kirchberger Decl. ¶¶ 96-102.

IV. VERIZON'S PERFORMANCE MEASURES AND THE PENNSYLVANIA PERFORMANCE ASSURANCE PLAN ARE INADEQUATE.

This Commission has held that "[w]here, as here, a BOC relies on performance monitoring and enforcement mechanisms to provide assurance that it will continue to maintain market-opening performance after receiving Section 271 authorization," the BOC must demonstrate that its performance enforcement plan contains a comprehensive set of "clearly-articulated, pre-determined measures and standards" that can "detect . . . poor performance" and accurately capture actual performance, as well as self-executing enforcement mechanisms with sufficient monetary consequences that will serve as powerful deterrents to anticompetitive conduct. *New York 271 Order* ¶ 433. The Pennsylvania Performance Assurance Plan ("PaPAP") on which Verizon relies to support its application does not and cannot satisfy this basic test.

The PaPAP is fundamentally flawed both in its comprehensiveness and its ability to capture actual performance for several reasons. *First*, the PaPAP is incomplete because it omits key measures that are essential to any showing of nondiscriminatory performance. *Second*, Verizon's improper implementation of performance measures in the PaPAP renders its performance results unreliable. Moreover, although Verizon asserts that the data replication test and "Commercial Availability Review" conducted by KPMG confirm the accuracy and reliability of its performance reports,[62] KPMG's tests were so limited in scope that they did not and could not validate the accuracy of Verizon's performance reports. *Third,* Verizon's performance results that serve as the basis for remedies calculations are unverifiable.

Not only are the performance measures and underlying performance data that serve as the springboard for remedies under the PaPAP incomplete, unreliable, and unverifiable, but the very structure of the PaPAP itself – including its illusory or paltry monetary remedies – renders it an ineffective tool to deter anticompetitive conduct after any Section 271 entry. Moreover, there can be no solace that Verizon will willingly adopt and properly implement any refined or new performance measures emanating from the New York collaborative proceedings as Verizon suggests,[63] or that it will embrace any New York PAP remedies that may be imported into the PaPAP in the future. Verizon's flagrant disregard of the Pennsylvania PUC's prior orders and its unilateral changes to established performance standards, coupled with its on-the-record opposition to the Pennsylvania PUC's imposition of *any* remedial enforcement mechanisms, demonstrate that it cannot be trusted to do the former or the latter. In fact, Verizon has steadfastly "oppose[d] the adoption of the New York PAP in Pennsylvania."[64] And, in all events, Verizon's promises and unfulfilled commitments cannot serve as a suitable surrogate for actual proof demonstrating that Verizon "is already in full compliance with the requirements of Section 271." *Michigan 271 Order* ¶ 55.

[62] Guerard/Canny/DeVito Decl. ¶¶143, 145.

[63] *See, e.g.*, Verizon Br. at 85 (noting that "all parties now agree that the remaining New York measurements should be adopted for use in Pennsylvania as well").

A. The PaPAP Does Not Measure Actual Performance.

1. The PaPAP Omits Key Measures.

The current version of the PaPAP does not and cannot possibly capture Verizon's actual performance in full because it excludes a number of measures that are necessary to detect discriminatory performance. Bloss/Nurse Decl. ¶¶ 15-22. As a result, Verizon will suffer no financial consequences under the PaPAP even for grossly discriminatory performance in those areas. Moreover, the exclusion of these metrics from the PaPAP violates the basic requirement that an enforcement plan must "encompass a comprehensive range of carrier-to-carrier performance." *New York 271 Order* ¶ 433.

The omitted metrics are neither trivial nor insignificant. One striking example is the failure of the PaPAP to include *any* measures on flow-through rates. Bloss/Nurse Decl. ¶ 25. This Commission has recognized that flow-through rates "are a tool used to indicate a wide range of possible deficiencies in a BOC's OSS that may deny an efficient competitor a meaningful opportunity to compete in the local market." *New York 271 Order* ¶ 162; *Massachusetts 271 Order* ¶ 77. Notably, when this Commission approved Verizon's Section 271 application to provide long distance services in New York, its performance assurance plan included remedies associated with two flow-through measurements: (1) the total flow-through rate (that measures the percentage of total orders received through the electronic ordering interface that are processed without manual intervention); and (2) the achieved flow-through rate (that measures the flow-through rates of orders that are designed to flow through). *See, e.g.*, Bloss/Nurse Decl. ¶¶ 25-26.

---

[64] Prehearing Memorandum of Verizon Pennsylvania, filed July 5, 2001, Re: Performance Measures Remedies, Docket No. M-00011468 (Pa. Pub. Util. Comm'n) ("Verizon Prehearing Memorandum") at 2.

In stark contrast, although the Pennsylvania Carrier-to-Carrier Guidelines ("Pa. C2C Guidelines") include a total flow-through measurement, that metric is reported by Verizon "for diagnostic purposes" only and is expressly *excluded* from the PaPAP.[65] Additionally, neither the Pa. C2C Guidelines nor the PaPAP contains *any* measurement covering Verizon's achieved total flow-through rate. Bloss/Nurse Decl. ¶¶ 25-26. Thus, under the current PaPAP, Verizon suffers no financial consequences for unacceptably high levels of manually-processed orders.

The significant omissions in the PaPAP are not confined to flow-through measurements. Notwithstanding the Commission's January 2001 *Line Sharing Reconsideration Order* directing Section 271 applicants to demonstrate that they provide line splitting in a nondiscriminatory manner, the PaPAP omits any metrics on line splitting. Bloss/Nurse Decl. ¶ 19. Similarly, despite this Commission's repeated admonitions regarding the importance of timely and accurate billing completion notices,[66] the Pa. C2C Guidelines, as well as the PaPAP, contain no measurements that assess Verizon's performance in those areas. *Id.* ¶ 24.

No anti-backsliding plan can achieve its intended goal of deterring anticompetitive conduct unless, *inter alia,* it is based upon a robust set of measures covering "a comprehensive range of carrier-to-carrier performance." *New York 271 Order* ¶ 433. These

[65] Opinion and Order, Joint Petition of NEXTLINK, Pennsylvania, Inc. *et al.* for an Order Establishing a Formal Investigation of Performance Standards, Remedies, and Operations Support Systems Testing for Bell Atlantic-Pennsylvania, Inc., Docket No. P-00991643 (Pa. Pub. Util. Comm'n re. Dec. 31, 1999) (December 31, 1999 Order), (Application, App. b, Tab R-8) at 64.

[66] *New York 271 Order* ¶ 187 (footnote omitted); In re Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service In the State of New York, Order Adopting Consent Decree, File No. EB-00-IH-0085m FCC 00-92 (Order release March 9, 2000) ("The receipt of the billing completion notice signals that Bell Atlantic has successfully transferred the customer to the competing carrier, which can then begin billing the customer without fear of double billing") at 3.

conditions do not presently exist in Pennsylvania; and it is, therefore, premature to rely on the PaPAP as an enforcement mechanism at this time.

2. The Performance Measures In The PaPAP Are Otherwise Unreliable.

Not only does the PaPAP exclude metrics that are essential to competition in the local market, but the measures contained within the PaPAP cannot be relied upon to report actual performance. Although Verizon touts the sheer number of measurements included within the PaPAP,[67] the volume of measurements is meaningless if they do not accurately capture the performance they are intended to measure. In order to provide *meaningful* information on performance, measurements must be well-defined, implemented properly and should not be subject to unilateral manipulation by the BOC. Unfortunately, a number of the performance measures within the PaPAP are ill-defined or inherently deficient because they do not capture actual performance. Bloss/Nurse Decl. ¶¶ 20-23. Additionally, actual market experience has shown that Verizon has unilaterally redefined or simply ignored other performance standards and guidelines at its whim. Bloss/Nurse Decl. ¶ 28.

Thus, for example, under the Pa. C2C Guidelines, Verizon is required to capture all local service request confirmations ("LSRCs") when calculating OR-6-03, the measurement on LSRC accuracy. Bloss/Nurse Decl. ¶¶ 33-34. However, Verizon, in flagrant disregard of performance standards, has captured only *samples* of LSRCs when reporting its performance in this area. *Id.* There are numerous other examples where Verizon has redefined or implemented performance measures in ways that skew its actual performance. *Id.* ¶¶ 36-44. Verizon's

[67] *See, e.g.*, Verizon Br. at 84.

unwillingness or inability to comply with prescribed metrics standards is not only inexcusable, but it also highlights the inherent unreliability of its performance results.

3. Verizon's Reliance On KPMG's Test Is Misplaced.

Wrapping itself in the data replication test and "Commercial Availability Review" conducted by KPMG, Verizon contends that those tests demonstrate that its "performance measurement process from start to finish" produces accurate and reliable performance data – data that necessarily serve as the basis for any remedies payments under the PaPAP. Guerard/Canny/DeVito Decl. ¶ 146. Verizon's claims cannot withstand analysis.

When KPMG conducted its data replication test, it neither verified Verizon's adherence to the definitions in the Pa. C2C Guidelines, nor scrutinized the actual processes that Verizon used to extract the data from its systems that served as the basis for KPMG's study. Bloss/Nurse Decl. ¶¶ 45-47. Notably, because KPMG relied upon the *same* data that Verizon used to calculate its performance results, any errors that Verizon made in extracting the data from its systems would have been replicated in KPMG's own test. *Id.*

Equally unfounded is Verizon's attempt to seek refuge in KPMG's "Commercial Availability Review." *See* Bloss/Nurse Decl. ¶¶ 49-53. Verizon's analysis ignores that, during that review, KPMG explicitly stated that it was beyond the scope of its engagement to perform a data integrity analysis to reconcile any discrepancies in performance results that were identified by the CLECs. *Id.* ¶¶ 50, 53. And, true to its word, KPMG never reconciled the discrepancies in performance results reported by the CLECs. *Id.* Thus, Verizon's reliance on the KPMG's tests as evidence of the accuracy and reliability of its performance data is misplaced.

4. Verizon's Performance Results Are Unverifiable.

Not only are Verizon's performance results unreliable, but the performance results underlying its remedies calculations are unverifiable. As noted above, Verizon has repeatedly deviated from established performance standards. To complicate matters further, Verizon has either shrouded in secrecy or provided insufficient information regarding its deviations from or changes to metrics procedures. Bloss/Nurse Decl. ¶¶ 57-71. Indeed, in its evaluation of Verizon's OSS, KPMG concluded that Verizon's implementation of metrics change control procedures was plagued with problems. *Id.* ¶ 64. Because Verizon has not properly implemented metrics change control procedures, it is impossible for CLECs to verify Verizon's performance results and ensure the accuracy of its remedies calculations. Bloss/Nurse Decl. ¶ 71.

Verizon attempts to gloss over these issues by stating that it has improved its performance by developing new internal procedures governing the metrics change control process in Pennsylvania. Guerard/Canny/DeVito Decl. ¶ 139. However, it matters little that Verizon has *developed* new procedures governing the metrics change control process if it fails to *implement* those procedures properly. And Verizon has offered no probative evidence that it is *presently* implementing and tracking changes to performance measures *properly*.

Plainly cognizant of these shortcomings, Verizon claims that: (1) it has implemented in New Jersey the same metrics change control procedures that it has adopted in Pennsylvania; and (2) KPMG has examined those procedures "under the auspices of the New Jersey Board of Public Utilities" and found "no issues" regarding Verizon's implementation of its enhanced metrics change control process. *Id.* ¶ 139. Critically, Verizon's assertion blithely ignores that KPMG found, in its ongoing test of Verizon's New Jersey OSS, that there are serious deficiencies in Verizon's metrics change notification process, and that those deficiencies thwarted the CLECs' ability independently to monitor and validate the accuracy of Verizon's performance results. Bloss/Nurse Decl. ¶ 69. Verizon has yet to address KPMG's concerns.

B. The PaPAP Cannot Deter Anticompetitive Conduct.

Because Verizon's performance results establish the point of departure against which any backsliding will be assessed, the inherent deficiencies in Verizon's performance results necessarily doom the PaPAP's remedies system to failure. Even *assuming arguendo* that Verizon's performance results could somehow be viewed as comprehensive, reliable, and verifiable, the structural flaws in the PaPAP make it impossible for the Commission to rely on the remedies provided under that plan to assure that Verizon will improve its future performance and not "backslide" into further discrimination.

The principal purpose of a performance assurance plan is to provide sufficient incentives for a BOC to continue providing CLECs the nondiscriminatory support required by Section 251 after a Section 271 application is granted. In order to be effective, an anti-backsliding plan must have definite monetary consequences that will be sufficient to dissuade the BOC from exercising its natural incentives to leverage its monopoly power in the local market, together with its position as the primary supplier of wholesale inputs to CLECs, to impede competition in both the local and long distance markets. Moreover, any such plan must be firmly rooted in an established, comprehensive and fully verified performance measurement system. The PaPAP falls far short of meeting these baseline requirements.

The PaPAP is structured in two tiers. Under Tier I, if Verizon misses a performance standard for a measurement within a thirty day period, Verizon is required to make a pro-rated refund to the affected CLEC of any "out-of-pocket expenses" incurred by the CLEC for services that it never received.[68] However, the purported remedies payments under Tier I are largely illusory. Bloss/Nurse Decl. ¶ 82.

Notably, Verizon is only required to make Tier I refund payments if (1) the CLEC received *no* service with respect to the measurement that was missed; *and* (2) the CLEC requests a pro-rated refund and "support[s] a claim of out of pocket expenses."[69] On its face, the latter requirement belies the notion that the Tier I remedy mechanism is somehow self-executing. Worse yet, the former requirement appears to be based upon an ill-founded assumption that, as long as a CLEC receives *any* service – no matter how abysmal its quality or timeliness – no payments are warranted.

Similarly, the structure of Tier II remedies in the PaPAP also suffers from fundamental infirmities that render it ineffective to deter anticompetitive conduct. Bloss/Nurse Decl. ¶ 72. Tier II provides that Verizon is only required to pay $3000 per "miss" if it misses the standard for a performance measure for two consecutive months, and $5000 if it misses the same measure for the same CLEC for three consecutive months. Although Verizon is required to pay $25,000 per miss if it misses the same measurement for the same carrier for four or more consecutive months, its ability to manipulate its performance makes it virtually certain that it will never (or hardly every) reach that level. Thus, the Tier II remedies payments are too small to deter Verizon from engaging in seriously discriminatory conduct; and, of course, Verizon suffers *no* financial penalties under Tier II for any performance failures occurring in the first month.

---

[68] December 31, 1999 Order at 159.

[69] Opinion and Order, Joint Petition of NEXTLINK Pennsylvania, Inc., et al., for an Order Establishing a Formal Investigation of Performance Standards, Remedies, and Operations Support Systems Testing for Bell Atlantic-
(continued)

Additionally, the methods that Verizon uses to calculate Tier II remedies, including aggregating data when it suits its purposes, further minimizes the risk of any financial exposure. *Id.* ¶¶ 83-86.

No performance enforcement plan will deter Verizon from engaging in anticompetitive conduct unless the magnitude of the financial consequences for discriminatory behavior is greater than the expected value of the gains that Verizon will enjoy through unlawful conduct. There is virtually no likelihood that the current PaPAP could have such an effect. Although Verizon claims that its annual remedies payments under Tier II of the PaPAP could exceed "the 39 percent of net revenues the Commission found sufficient in Massachusetts,"[70] Verizon's analysis is based upon a set of unrealistic and unsupportable assumptions. Bloss/Nurse Decl. ¶ 84. The reality is that the maximum financial exposure that Verizon faces under the PaPAP is between about 10 and 25 percent of its net return – an amount well below the maximum potential risk of liability that the Commission deemed sufficient in Massachusetts. *Id.* ¶ 85.

The PaPUC, fully cognizant of the PaPAP's limitations and shortcomings, recently announced that it will conduct an additional proceeding, and that it has established "'a rebuttable presumption that the features of the NY remedies plan should be made applicable and tailored to Pennsylvania.'" Verizon Br. at 87 n.93. By referencing this most recent announcement in its application and observing that "all parties now agree that the remaining

Pennsylvania, Inc., Docket No. P-00991643 (Pa. Pub. Util. Comm'n rel. Sept. 1, 2000) ("September 1, 2000 Order") (Application, App. B, Tab R-11) at 68.

[70] Verizon Br. at 89.

New York measurements should be adopted or use in Pennsylvania as well,"[71] Verizon leaves the impression that it would willingly adopt any new remedies and properly implement any new measurements that may be imported from New York into the PaPAP. However, Verizon's conduct before the Pennsylvania PUC demonstrates that the Commission should not accept such implications uncritically.

Months after the PaPUC initiated proceedings to examine performance measures, standards and remedies that should be adopted, Verizon challenged the PaPUC's authority to implement *any* performance standards and remedies. Bloss/Nurse Decl. ¶ 10. Moreover, in its state court appeal seeking to overturn the PaPAP, Verizon specifically maintained that "absent [Verizon's] concurrence, the Commission lack[ed] the authority to adopt and implement performance measures, standards, and remedies." *December 31, 1999 Order* at 8. Not only was Verizon's position fundamentally flawed, but it was also inconsistent with its "concession that performance measures, standards, and appropriate, self-executing remedies are a necessary prerequisite to the Commission's review of [its then] anticipated Section 271 Application." *Id.* at 12. In fact, it was only after the PaPUC expressly conditioned its approval of Verizon's Section 271 application, *inter alia,* on the withdrawal of its state court appeal that Verizon grudgingly withdrew its state court appeal – and then it did so *without prejudice.* Thus, Verizon remains free to challenge at *any* time the PaPUC's authority to impose *any remedies* for its performance failures. Bloss/Nurse Decl, ¶¶ 91-92. It must also be emphasized that Verizon has adamantly *opposed* the adoption of the New York PAP in Pennsylvania.[72] Given this remarkable set of circumstances, Verizon cannot seriously contend that it is currently subject to an enforcement

[71] Verizon Br. at 85.

[72] *See, e.g.,* Verizon Prehearing Memorandum at 2.

plan with "a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal."[73]

Equally unfounded is any suggestion that Verizon will unflinchingly embrace or properly implement any measures that may be incorporated into the Pa. C2C Guidelines in the future. Verizon's repeated refusals and outright failures to comply with PaPUC's orders and performance standards in the past clearly warrant substantial skepticism from this Commission.

For example, in clear defiance of the *December 31, 1999 Order* directing it to file a "compliance report" setting forth all of the performance standards established by the Pennsylvania PUC, Verizon filed a document that was littered with unilateral and unauthorized changes to prescribed metrics standards. Bloss/Nurse Decl. ¶ 8. Similarly, Verizon flouted the same *December 31, 1999 Order* direction to report on all performance measures commencing in April 2000. In fact, Verizon provided no results at all for scores of metrics for months and simply advised the CLECs that the omitted metrics were either "under development" or "under review." Bloss/Nurse Decl. ¶ 29. And, even after Verizon presumably "developed" or completed its so-called "review" of the metrics in question, it neither restated its prior performance results to include the data that it had unilaterally omitted in the first instance, nor agreed to make any retroactive payments for any performance failures covered by the omitted metrics. *Id.* ¶ 30.

Against this backdrop, Verizon should not be permitted to rely on any *future* changes to performance measures or *future* refinements to the system of PaPUC remedies as evidence of its *present* compliance with its Section 271 obligations. Past experience on these

[73] *New York 271 Order* ¶ 433.

very issues has taught that there is no reason to believe that Verizon will willingly adopt or properly implement any such changes for Pennsylvania. And, in all events, this Commission has repeatedly held that "promises of future compliance" are entitled to no evidentiary weight.[74]

The deficiencies in the comprehensiveness, reliability, and verifiability of Verizon's performance measurements, as well as the defects in the remedial structure of the PaPAP, must be corrected now, before Verizon receives interLATA authorization under Section 271. The standards that this Commission has uniformly established for Section 271 compliance require no less; and those standards are too vital to protect nascent local competition to warrant compromise now.

V. VERIZON'S APPLICATION IS NOT IN THE PUBLIC INTEREST.

There is a final, independent reason why the Commission should deny Verizon's application. Even if the Commission could rationally find that Verizon had fully implemented its obligations under the competitive checklist, including its duty to set cost-based rates within the range that a reasonable application of TELRIC would produce or to provide nondiscriminatory access to resold DSL and to its operations support systems, the record here precludes any finding that granting Verizon's application is "consistent with the public interest, convenience and necessity." 47 U.S.C. § 271(d)(3)(C).

The reason is straightforward. At the heart of the public interest inquiry, as Congress conceived it and as this Commission has explained, is a determination of whether, notwithstanding checklist compliance, the local market is in fact fully open to competition. The first step is to assess the actual state of local competition. Here, the record shows that residential

[74] *New York 271 Order* ¶ 39. *See also Ameritech Michigan 271 Order* ¶ 55; *BellSouth South Carolina 271 Order* ¶
(continued)